Petition

81-506

No.

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IN THE

Supreme Court of the United States

TERM, 1981

JOE F. SOTO,

Petitioners,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARC A. ZITO
Jones & Granger
P. O. Box 4340
Houston, Texas 77210
(713) 668-0230
Attorney for Petitioner

JOSEPH P. MANNERS
Machinists Building
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-5200
Attorney for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

QUESTIONS PRESENTED

The question presented here is whether sufficient evidence was presented at trial to justify the jury's verdict for the Petitioner, and thus, the District Court erred in granting Defendant's Motion Notwithstanding Verdict and Judgment.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS

The undersigned, counsel of record, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Joe F. Soto, Plaintiff-Petitioner
Southern Pacific Transportation Co., Defendant
Jones & Granger, Contingent Fee interest
Matthews, Nowlin, MacFarlane & Barrett, Defendants Counsel

The Petitioner, Joe F. Soto, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review its judgment in the above entitled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 644 F.2d 1147. The judgment of the District Court for the Western District of Texas is not reported but is set forth in appendix A(2) to this Petition.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

The order of the United States Court of Appeals for the Fifth Circuit was entered on June 22, 1981.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States provides in pertinent part as follows:

> "in Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, then according to the rules of the common law."

The applicable statutory provisions involved, herein, are the Federal Employers Liability Act, Sec. 1 et seq. as

amended, 45 U.S.C.A. Sec. 51 et seq. which reads in pertinent part as follows:

> "every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and foreign nation or nations, shall be liable in damages to any persons suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or inpart from the negligence of any of the officers, agents, or employees of such carrier, or by reason if any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road bed, works, boats, wars, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely insubstantially, effect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Supreme Court Rule 19 dealing with considerations governing review on certiorari reads in pertinent part as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only

where there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

(b). Where a Court of appeals has rendered a decision then....; or has decided a federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercist of this Court's power of supervision.

STATEMENT OF THE CASE

A. The Original District Court Proceedings.

Plaintiff, Joe F. Soto, sued his employer, Southern Pacific Transportation Company, Defendant, under the Federal Employers' Liability Act, for damages for injuries allegedly sustained to his back on April 30, 1976, while Plaintiff was working as a laborer for Defendant. On July 1, 1977, Defendant answered the complaint denying the allegations of negligence contained in Plaintiff's Original Complaint and further denying the alleged injuries that were sustained by Plaintiff on April 30, 1976.

On June 13, 1977, the case was set for trial before Honorable Q. A. Bootle, Senior United States District Judge for the Middle District of Georgia who was, on February 5, 1979, designated by Chief Judge John R. Brown, to head a district court in the Western District of Texas during the period beginning June 11, 1979 and ending on June 25, 1979. A jury was selected on June 13, 1977 and the trial of the issues ensued. Subsequently, the jury

rendered a verdict by answers to special interrogatories. The jury found the Defandant negligent and that such negligence had some causal connection with Plaintiff's injuries and further found that the Plaintiff himself was contributorily negligent to the extent of 34% and a final verdict was rendered after deduction for contributory negligence. The final judgment was entered on June 27, 1979 in favor of Plaintiff and against the Defendant in the amount of $124,740.00 less certain lines incurred by Plaintiff.

During the trial of this lawsuit, the Defendant had moved for a directed verdict at the close of Plaintiff's case. The Honorable Court reserved its ruling on said motion and Defendant renewed the motion at the close of all the evidence which was overruled. Thereafter, Defendant filed its "Motion For Judgment Notwithstanding the Verdict".

On Novenber 9, 1979, the Honorable W. A. Bootle rendered a Memorandum Opinion and concluded in said opinion that the Plaintiff did not establish "even a minimal negligence". In accordance with the Court's decision an order was entered on November 19, 1979, granting Defendant's Motion Notwithstanding the Verdict and Judgment thereby reversing the jury verdict heretofore rendered.

B. Proceedings in the United States Court of Appeals for the Fifth Circuit.

The Petitioner timely filed his Notice of Appeal and perfected his appeal in the United States Court of Appeals for the Fifth Circuit. The Court of Appeals placed this matter on the summary calendar in accordance with its Rule 18 for the United States Court of Appeals for the Fifth Circuit.

C. Decision Of The Court Below.

The United States Court of Appeals for the Fifth Circuit ruled, on June 22, 1981, that there was insufficient evidence to support a finding that the employer was guilty of any negligence. The United States Court of Appeals thereupon affirmed the action of the District Court.

REASONS FOR GRANTING THE WRIT

The decisions below encroach upon the rights of employees under the Federal Employers Liability Act. They are in conflict with applicable decisions of this Court construing that statute.

The trial court concluded that a railroad defendant in an F.E.L.A. case, which enjoyed the benefits of an employee's services for many years could defeat his just claim for recompense for injuries suffered. Both the original trial court and the appeals court improperly took away the jury's finding as to whether the Defendant was negligent within the meaning of the F.E.L.A.

The decision of the Circuit Court of Appeals for the Fifth Circuit is in clear conflict with a long and continuing series of cases decided by this Court demanding that such issues are the decision of juries. Reversal of this decision is a necessity under the current rules of law and to carry out the Congressional intent of that body of legislation commonly referred to as the Federal Employers Liability Act.

There is a clear conflict between the decision of the Court of Appeals for the Fifth Circuit and this Court. Standards enunciated by this Court for submission of a cause tried under the auspices of the Federal Employers Liability Act are most clearly set forth in *Rogers v. Missouri Pacific R.*

Co., 356 U.S. 326 (1958), in which this Court clearly stated that, "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." This Honorable Court has continued to uphold and enforce this standard through numerous cases brought before this Court on this very issue.

It is interesting to note that the decision of the Court of Appeals for the Fifth Circuit cites no cases in supporting the finding. In pertinent part, the Fifth Circuit states, "employer negligence remains a prerequisite to liability."

This Court has addressed the threshold issue on several occasions. In *Wilkinson* v. *McCarthy*, 336 U.S. 53 (1949), the Court wrote:

> "In reaching its conclusion as to the negligence, a jury is frequently called upon to consider many separate strands of circumstances to draw its ultimate conclusions on the issue of negligence. Here there are many arguments that could have been presented to the jury in an effort to persuade it that the railroad's conduct was not negligent, and many counter arguments which might have persuaded the jury that the railroad was negligent."

In *Tennant* v. *Peoria & Pekin Union Railroad Co.*, 321 U.S. 29 (1944), the Court stated:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Similarly, the United States Court of Appeals for the Fifth Circuit has written in *Boeing* v. *Shipman,* 411 F.2d 365

> "Beyond the fact that a statutory action under the FELA significantly differs from a common law negligence action in terms of the standard of proof, it is clear that the Congressional intent in enacting the FELA was to secure jury determinations in a larger proportion of cases then would be true or ordinary common law actions. In other words, 'trial by jury is part of the remedy' in FELA cases."

The Fifth Circuit has reaffirmed its standard of review in *Narcisse* v. *Illinois Cent. Gulf R. Co.,*620 F.2d 544 and *Spurlin* v. *General Motors Corp.,* 528 F.2d 612. In Spurlin, the Fifth Circuit stated:

> "The standard adopted by this Court is that the district court should not grant a new trial motion unless the jury verdict is 'at least . . . against the *great* weight of the evidence.' *Cities Service Oil Co.* v. *Launey, supra,* at 540 (emphasis in the original). A rule which would permit a court to grant a new trial when the verdict was merely against the 'greater weight' of the evidence, this Court said, would destroy the rule of the jury as principal trier of the facts, and would enable the trial judge to disregard the jury's verdict at will.'

In granting a judgment notwithstanding the verdict, the Final Court dissolved the jury's findings regarding negligence, and substituted its finding in spite of the jury determination. The Trial Court's granting of a judgment n.o.v. and its affirmance by the Fifth Circuit is a departure from the basic and fundamental features of the system of federal jurispurdence, i.e. The Petitioners right to trial by jury which "is part and parcel of the remedy afforded railroad workers uner the Employees Liability Act." *Bailey v. Central Vt. R. Co.,* 319 U.S. 350.

CONCLUSION

The decision below is clearly erroneous. For the foregoing reason, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MARC A. ZITO
Jones & Granger
P. O. Box 4340
Houston, Texas 77210
(713) 668-0230

Attorney for Petitioner

JOSEPH P. MANNERS
Machinists Building
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-5200

Attorney for Petitioner

APPENDIX A(2)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

JOE F. SOTO,

Plaintiff

Civil Action No.

SA-77-CA-171

versus

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Defendant.

BOOTLE,* Senior District Judge:

Ready for decision now is the defendant's motion for judgment in its favor notwithstanding the jury verdict for plaintiff. At trial the court overruled the defendant's timely motions for directed verdict though then entertaining serious doubts as to whether the evidence warranted jury submission. That conservative course was adopted so that the jury could pass upon the case in the first instance thereby avoiding the necessity, come what may, of reinstating the case upon an overcrowded trial docket.

When the instant motion came in, the court, though still recalling the evidence right vividly, out of an abundance of caution, and so that the motion could receive the careful consideration to which it is clearly entitled, ordered a transcript of the record as it relates to negligence and causation. A study of that transcript confirms the doubts which the court entertained at trial. A brief summarization of the facts will disclose the necessity for granting the instant motion.

*Sitting by designation.

In 1974, plaintiff, then 35 years of age, went to work for defendant at a laborer. Then for a short while he became a machinist apprentice, was relieved of employment through a reduction-in-force layoff, and then rehired at a laborer.

On April 29, 1976 he reported for work on the 11:00 P.M. to 7:00 A.M. shift. He began work cleaning out the number 6 diesel pit. He says his gang leader said, "Well, let's start cleaning those pits.; The gang leader says he did not tell him to clean the pit but that the plaintiff started to clean the pit because "we been told by the forman to clean up around there."

There are two diesel pits, number 6 and number 7. They are cement-lined excavations underneath the railroad tracks, as side as the tracks, five or five and one half feet deep, and as long as two diesel engines. The purpose of the pits is to permit workmen to stand upright and perform maintenance work on the lower parts of the diesel eingines, with rain water until it runs out through a drain at the bottom of the pit and with other debris including cans and trash that sometimes finds its settling place there. There are three methods for removing all this matter from the pits. The area adjacent to these pits on all sides is paved. In all three methods the workman descends into the pit by a ladder at one end and with a shovel throws the debris up and out to the paved area adjacent to the pit. In one method he throws it directly into a wheelbarrow situated adjacent to the side of the pit. When the wheelbarrow is loaded to a proper extent and amount (determined by the workman) he ascends the ladder, rolls the wheelbarrow and content a distance of approximately fifty to seventy-five feet, dumps it into a pile, then returns and repeats the process. Another method is to shovel the debris into a container constituting a part of a front-end loader commonly called a "bobcat." The third

method is to shovel the debris directly into a metal box attached to a forklift.

The evidence is vague and uncertain as to what, if any, considerations determine which of the three methods is used.

Charles L. Casey, a mechanical foreman with the defendant with six years experience, testified that there was no reason why he would use a wheelbarrow on one occasion and a forklift or bobcat on another, (Transcript p. 205)

Benjamin Franklin Phrampus, a diesel mechanical foremanwhen asked, "What about using the bobcat or forklift at night," testified that on the 3:00 to 11:00 shift he seldom used the bobcat or forklift; that one reason was that there wasn't a key available and most of the time the bobcat and the forklift were broke down; "only use it when I needed to use—move heavy materials, tractor's motors and wheels," and that on his shift if the bobcat or forklift had been available to him he would have used them if he needed them but "I can't elaborate any why I would use it or what would make me need it. (p. 259)

James Earl Hill, a gang leader, testified, "there is really no set way to do it." (p. 267)

Whereas, Mr. Casey, the mechanical foreman, said "the most common used method is a forklift" (p. 213), Mr. Raymond Valenzuela, Jr., an apprentice machinist, formerly a laborer, testified that he had used a forklift "one or two times . . . when the bobcat was broke down." (p. 219)

Apparently, only the wheelbarrow was used on the night shift. Plaintiff's gang leader, Mr. Jasso, did not know how to operate the bobcat. (p. 284) Plaintiff had never operated either piece of equipment and had never been trained to do so. (pp. 118, 165) Mr. Casey, the mechanical foreman, testified that a man would have to receive some instructions before operating the bobcat—about a half hour—and "a few minutes" instruction before using the forklift. (p. 208)

James Earl Hill, the gang leader, says he never really makes the decision based upon how much sand is in there, "but you could, If you got a lot of sand . . . you are going to need a forklift and sand box . . . If you got a little bit of sand, you use the front end loader . . . . When it's practically nothing in there [two or three wheelbarrows full] you would use the wheelbarrow." (p. 267) Similarly, Mr. Jasso, plaintiff's gang leader, testified, "Well, we got a little bit of sand or whatever gets in the pits, we use a wheelbarrow all the time. . . . When we get . . . a whole lot of sand, we get a forklift and a hopper or that bobcat." (p. 282)

On the night in question the plaintiff loaded the wheelbarrow once and rolled it away some fifty or seventy-five feet, emptied it and rolled the empty wheelbarrow back to the pit. There was no mishap on that first trip. Plaintiff estimates that the first load weighed 200 to 300 pounds. Then he reloaded the wheelbarrow, pushed it the same distance and when he was unloading or "dumping" the wheelbarrow he heard something "pop" and felt something in his back. He felt no pain then because his "body was still hot." (p. 112) The pain came later. He was "going to go back in the hole" but was called away to another assignment. (p. 130) Apparently there was not much debris in the pit that night. When asked about that, the plaintiff said, "plenty to fill up two of those [wheelbarrow loads]." (p. 151) We have plaintiff's testimony that he was "about to go back in the hole," but was sent to another job and the gang leader's testimony that he "guesses" the plaintiff got the pit pretty well cleaned out, though he did not check it.

Of controlling significance are the following facts:

There was nothing wrong with the wheelbarrow that night. The plaintiff so testified. (p. 148) In fact it had a rubber tire and the defendant had been using rubber-tired wheelbarrows for ten years; (p. 270)

There was nothing wrong with the shovel that night. The plaintiff so testified; (p. 148)

Moreover, there was nothing wrong "with the area there where [plaintiff] was working along within the pit or on the walkway." The plaintiff so testified. (p. 148) This means that there was no obstruction or impediment to the free rolling of the rubber-tired wheelbarrow; and

There was no one rushing the plaintiff to do the job in a hurry (p. 150) and there was no reason why the plaintiff could not have put less sand in the second load. (p. 151) The plaintiff so testified.

This court is not at all unmindful of the great reluctance courts entertain with respect to limiting jury resolutions in FELA cases. Even minimal negligence on the part of the railroad employer will support a verdict in favor of the employee. Certainly if even minial evidence supports a jury finding against the employer such a finding is invulnerable. But just as certainly, if a verdict finds no support in the evidence, it should be set aside, This rule was succinctly stated in *Rodriguex* v. *Delray Connecting R.R.*, 473 F.2d 819 (6th Cir. 1973) as follows:

> The Federal Employer's Liability Act consistently has been construed liberally by the courts to allow employees, injured in the course of their employment, to recover even where the negligence of the employer has been minimal. [2]However, the employee must still

[2]See for example, *Gallick v. Baltimore & Ohio RR Co.*, 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 613 (1963). (Railroad held liable where an employee was bitten by an insect. Negligence was found in permitting a stagnant pool of water to exist that attracted vermin and insects.); *Webb v. Illinois Central RR Co.*, 352 U.S. 512, 77 S.Ct. 451, 1 L.Ed.2d 503, *rehearing denied*, 353 U.S. 943, 77 S.Ct. 809, 1 L.Ed.2d 164 (1957) (Railroad found liable where an employee slipped on a cinder embedded in a roadbed.); *Tennant v. Peoria & Perkin Union Rr Co.*, 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520, rehearing denied, 321 U.S. 802, 64 S.Ct. 610, 88 L.Ed. 1089 (1944) (Railroad found liable where one of its engineers failed to ring a bell before starting the locomotive.)

demonstrate some negligence and proximate cause, *Herdmann* v. *Pennsylvania RR Co.*, 352 U.S. 518, 520, 77 S.Ct. 455, 1 Ed.2d 508 (1957); *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 67, 63 S.Ct. 444, 87 L.Ed. 610 (1943).

The rule must still be that in order to recover the plaintiff must "demonstrate some negligence and proximate cause."

The plaintiff alleged negligence on for grounds, which are:

(a) Defendant failed to furnish the plaintiff with a reasonably safe place to work;

(b) Defendant failed to furnish the plaintiff with rasonably safe equipment with which to perform his work;

(c) Defendant failed to warn the plaintiff of the hazardous method by which he was being required to accomplish his assigned task; and

(d) Defendant required the plaintiff to perform tasks of heavy manual labor for which he was physically unfit and which the defendant knew or should have known would be injurious to the plaintiff's physical condition.

With respect to ground (a), there could hardly be a safer place to work than the paved area over which plaintiff was rolling the wheelbarrow.

With respect to ground (b), the plaintiff's own testimony, not contradicted by any other evidence in the case, demonstrates that both the wheelbarrow and the shovel, as well as the area where plaintiff was working, along with the pit and the walk way, were safe. If this verdict stands its purported message to railroads would be that they can no longer use wheelbarrows, even when equipped with rubber

tires, and that the use of such wheelbarrows is "unreasonable." That message would be much more startling and more drastic than the message sent by *Rodreguez, supra,* to the effect that the appearance on the scene of the hydraulic spike remover rendered "unreasonable" the old maul and crowbar method of removing spikes. There is much difference between a rubber-tired wheelbarrow moderately loaded and being pushed over a smooth level surface and swinging a maul striking steel against steel.

We perceive the law still to be that even in FELA cases an employer is neither required to furnish the employee with the latest, best or most perfect appliance with which to work, nor to discard standard appliances already in use that are reasonably safe and suitable, even though later improvements have been discovered. *Chicago & Northwestern Rwy. Co. v. Bower,* 241 U.S. 470, 36 S.Ct. 624, 60 L.Ed. 1107 (1916); *Baltimore Rwy. Co. v. Groeger,* 266 U.S. 521, 45 S.Ct. 169, 69, L.Ed. 419 (1925); *Atlantic Coastline v. Dixon,* 189 F.2d 525 (5th Cir. 1951). *See also Palmer v. Wichita Falls Northwestern Rwy. Co.,* 159 P. 1115 (Ok., 1919) and *Lowden v. Bowen,* 183 P.2d 980 (1947).

Since the railroad employer is charged with the duty of providing the employee with reasonably safe equipment in order to meet that responsibility, the employer must be accorded the privilege of selecting the equipment. It is not difficult to imagine what could have happened if defendant had ordered the plaintiff to use this mechanical equipment with which he was not familiar and as to which he had received no training. If he had used such equipment and if it caused him injury, the plaintiff, with some logic, could have urged that the defendant was negligent in not providing him with the more easily operated and much safer wheelbarrow.

As to ground (c), we fail to see that under the evidence in this case plaintiff was being required to accomplish his task in any hazardous manner or that any warning was required or appropriate.

As to ground (d), the evidence contains no suggestion that defendant had any knowledge that plaintiff was physically unfit to do the work ordinarily required of a laborer at a railroad, for which work plaintiff applied and was accepted. On the contrary, the record shows that plaintiff had no physical problems when he was employed by defendant (p. 100), that he was employed as a laborer (p. 100), and that ""before he went to work for the railroad company he [had] always engaged in jobs that required heavy lifting, manual labor." Plaintiff's counsel, in his opening statement to the jury, stated that plaintiff had previously served as a truck driver "which inoloved delivering beverages where they would lift kegs of beer and cases of beer and soda pop and deliver the, ..." (p. 76)

Notwithstanding the great latitude which the law allows to juries in finding "minimal" neglect against a railroad employer under the Federal Employers Liability Act and with no criticism of that latitude, this court is empelled to the conclusion that, under the facts of this case, not even minimal negligence has been established.

Counsel for the defendant may prepare and submit an appropriate order granting the pending motion, after affording counsel for plaintiff an opportunity for suggestions as to form.

SO ORDERED, this 5th day of November, 1979.

/s/ W. A. BOOTLE

W. A. Bootle

Senior U.S. District Judge

Joe F. SOTO, Plaintiff-Appellant,
v.
SOUTHERN PACIFIC TRANSPORTATION COMPANY, Defendant-Appellee.
No. 79-3965.

United States Court of Appeals,
Fifth Circuit.
Unit A

May 14, 1981

Railroad employee sued employer under the Federal Employers' Liability Act. The United States District Court for the Western District of Texas, W. A. Bootle, J., sitting by designation, entered judgment n. o. v. for the employer and employee appealed, The Court of Appeals held that there was insufficient evidence to support a finding that the employer was guilty of any negligence.

Affirmed.

Appeal from the United states District Court for the Western District of Texas.

Before BROWN, COLEMAN and GEE, Circuit Judges.

PER CURIAM:

In this action under the Federal employers' Liability Act (FELA), 45 U.S.C.A. § § 51-60, the jury returned a verdict for Mr. Soto, the plaintiff employee, but the district court entered judgment n. o. v. for his employer on the ground that there was insufficient evidence to support a finding that the employer was guilty of any negligence. An examination of the briefs and the record reveals that the judgment should be affirmed.

As related in greater detail in the district court opinion, *Soto v. Southern Pacific Transportation Co.*,No. SA-77-CA-171 (W.D.Tex., Nov. 5, 1979), the essentially undisputed evidence in the case established that at the time of his injury Mr. Soto was dumping a rubber-tired wheelbarrow which he had loaded with trash and sand cleared from pits used for servicing the underside of diesel engines. By his own testimony he determined the size of the load he was carrying: no one was rushing him at his task and there was no reason why he should not have made the load lighter, Further, there was nothing wrong with the wheelbarrow, the shovel, or the area where the barrow was being wheeled by Mr. Soto.

[1, 2] The FELA is not a workers' compensation system. Employer negligence remains a prerequisite to liability. As the district court observed in its opinion: "If this verdict stands its . . . message to railroads would be that they can no longer use wheelbarrows, even when equipped with robber tires, and that the use of such wheelbarrows is 'unreasonable.' " That there were other, arguably more advanced, methods in use by the defendant for cleaning these pits is of no significance where the method in use by Mr. Soto was not an ingerently unsafe one. The task at which Mr. Soto was injured was one that could be safely done by the method which he was told to use and was using.

AFFIRMED.

No. 79-3965
D.C. Docket No. SA-77-CA-171
JOE F. SOTO,

Plaintiff-Appellant,

versus

SOUTHERN PACIFIC
TRANSPORTATION COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

Before BROWN, COLEMAN and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

May 14, 1981

Issued as Mandate: Jul 2 1981

Opposition

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No. 81-506

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOE F. SOTO,

Petitioner,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION

FERD. C. MEYER, JR.
Counsel of Record
HOWARD P. NEWTON
MATTHEWS & NOWLIN
1500 Alamo National Building
San Antonio, Texas 78205
(512) 226-4211

Attorneys for Respondent
Southern Pacific Transportation Company

October 14, 1981

QUESTION RESTATED

Whether the courts below, upon delineating Respondent's legal duty to Petitioner under the Federal Employers' Liability Act, properly concluded that Petitioner presented *no* evidence of Respondent's negligence to support the jury's verdict.

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No. 81-506

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOE F. SOTO,

Petitioner,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION

STATEMENT PURSUANT TO RULE 28.1

Respondent, Southern Pacific Transportation Company, is a wholly-owned subsidiary of Southern Pacific Company, a publicly held corporation whose stock is traded on the New York and Pacific Stock Exchanges.

Contrary to the statement in the Petition, counsel for Respondent have no interest in the outcome of this case.

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" adequately describes the proceedings in the courts below, except for the failure to note that the Court of Appeals denied a rehearing and rehearing en banc on June 22, 1981. Surprisingly, in view of the question presented, the Petition does not contain a single reference to the evidence of record. The result is an abstract discussion of legal principles amidst conclusory statements that the lower courts committed error.

The evidence is well summarized in the opinion of the District Court, which contrary to Petitioner's statement is reported at 514 F.Supp. 1 (W.D. Tex. 1979) and is set out as Appendix A to this brief.[1] A brief review of this evidence here will disclose the basis for the opinions of the courts below.

Petitioner went to work for Respondent in 1974 as a laborer. On April 29, 1976, he reported to Respondent's diesel shop in San Antonio for work on the 11:00 p.m. to 7:00 a.m. shift, and began to clean the no. 6 diesel pit. This pit is one of several placed beneath railroad tracks to allow maintenance workers access to the undercarriage of diesel locomotives (App. A-2).

As locomotives stop and start above the pits, sand is deposited on the rails to provide friction (Tr. 105, 147, 166), and certain quantities end up in the pits. Grease, water, oil and other debris also accumulate and mix with the sand near the drain at the bottom of the pit (App. A-2) (Tr. 107, 203). It was a routine part of Petitioner's duties as a laborer to remove this debris from the pits (Tr. 143, 203, 279).

The method Petitioner chose for cleaning the no. 6 pit on this occasion was to place a wheelbarrow on the walkway at the edge of the pit and shovel the debris directly into it (Tr. 107). Since the tub of the wheelbarrow was above eye level (Tr. 108, 146), Petitioner could not see into it (Tr. 107). He did not count the shovels of debris (Tr. 148, 151), and only stopped placing debris in the wheelbarrow when water started dripping from it (Tr. 107).

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[1] Petitioner's Appendix contains numerous printing errors which do not appear in the reported opinion of the District Court. Besides misspellings, there is at least one instance, on page 2a, where the first half of a sentence is omitted. Respondent, therefore, has included an accurate reproduction of the opinion as Appendix A to this brief and will reference this Appendix when citing the District Court's opinion. References to the transcript of proceedings in the District Court will include the abbreviation "Tr." followed by the appropriate page number.

There is no evidence Petitioner was ever instructed to use this method to fill the wheelbarrow. Petitioner himself testified he had seen men shovel debris from the bottom of a pit onto the walkway (Tr. 153). They would then get out of the pit and fill the wheelbarrow from a position where they could observe the amount of debris they were placing in it (Tr. 153). Petitioner stated this was a permissible and acceptable method (Tr. 153).

The rubber-tired wheelbarrow was in good condition and free of defects (App. A-4) (Tr. 148). There were stairways at both ends of the pit and the area was well lighted (Tr. 147). The cement walkway and the area around the pit were in good condition and did not contribute to the accident (App. A-4) (Tr. 148).

Petitioner loaded the wheelbarrow until it weighed 200 to 300 pounds (Tr. 149). He then moved it seventy-five feet and dumped the contents into a pile that was periodically hauled away (Tr. 112, 209). This first trip was completed without incident (App. A-4) (Tr. 112, 149).

There was nothing urgent about this assignment. No one told Petitioner there was a deadline for completion of this task and at no point did anyone attempt to rush him (Tr. 150). Petitioner, working on his own, had total control over the amount of debris he placed in the wheelbarrow. He knew of no reason why he could not load less sand on each trip if he chose (Tr. 151), and understood that the purpose of doing so would be to lessen the weight of the wheelbarrow (App. A-5) (Tr. 152).

Petitioner injured himself at the conclusion of his second trip with the wheelbarrow as he was dumping its contents (Tr. 112). He felt and heard something pop in his back (App. A-4) (Tr. 112-113). There is no evidence how much this second load weighed. With a small amount of sand remaining in the pit (Tr. 151, 196), Petitioner, who only began to feel pain later, was interrupted and assigned to another job (Tr. 113).

While the wheelbarrow was the only method used to haul debris on the graveyard shift (App. A-3), varying methods were used on the earlier shifts. Each method involved a worker shoveling debris out of the pit. The difference was that a forklift or front end loader would be used instead of a wheelbarrow to haul the debris away from area of the pit (App. A-2).

Most of the witnesses had observed or used all three methods for hauling this debris (App. A-3) (Tr. 204, 219, 255, 282). The only witness asked to focus on the date of the accident, as opposed to the time of trial or the date of a deposition, testified that the wheelbarrow was the most frequently used method in 1976 (Tr. 216, 218-219, 226). Gang leader James Hill was the only witness who articulated a criterion for selection of a particular method. He testified that with small amounts of debris he would use the wheelbarrow, while larger quantities would justify the use of a forklift or front end loader (App. A-4) (Tr. 267-268). Petitioner testified that on the night of April 29-30, 1976, there was a small amount of sand in the pit he was cleaning (Tr. 151).

All the witnesses, including Petitioner, agreed that use of a wheelbarrow to transport debris was perfectly safe, provided one could control the weight of the load (Tr. 151-152, 231, 240, 268-270, 283). Both Petitioner and his supervisor testified that Petitioner had such control (Tr. 151, 282-283).

Finally, the record is understandably devoid of any actual or constructive notice to Respondent that the use of wheelbarrows for their intended purpose had resulted in similar accidents or was in any way hazardous to Petitioner or anyone else.

REASONS FOR DENYING THE WRIT

I.

FED. R. CIV. P. 50(b) IS NOT UNCONSTITUTIONAL AND THE DECISIONS OF THE COURTS BELOW WERE NOT BARRED BY THE SEVENTH AMENDMENT

Among the constitutional and statutory provisions cited by Petitioner is the Seventh Amendment's guarantee of a jury trial in suits at common law. Petition at 2. Since the body of Petitioner's argument which follows does not discuss or even mention the Amendment, one is left to guess how Petitioner's right to a jury trial is implicated. Given the proceedings below, Petitioner is presumably contending that the Seventh Amendment barred the trial court from relying on Fed. R. Civ. P. 50(b) to render judgment in Respondent's favor notwithstanding the jury's verdict.

An identical argument was considered, and rejected by this Court almost forty years ago, shortly after the adoption of the Federal Rules of Civil Procedure. *Galloway* v. *United States*, 319 U.S. 372 (1943). In the face of a claim that a directed verdict violated the Seventh Amendment, the Court noted that the common law in 1791 fully recognized the power of trial courts to withdraw cases lacking in proof from the jury. While the procedures of 1791 incident to the exercise of this power had atrophied, the evolution of new procedures had been recognized and approved by the Court over the course of a century. *Id.* at 389-390. The right to a jury trial has never been absolute and "the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements . . ." *Id.* at 392.

A plaintiff in a suit brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C.A. § 51 *et seq.*, has no greater right to a jury trial than a plaintiff in any other action at common law. When a suggestion was made that the FELA give

special protection to the right of a jury trial, the proposal was rejected on the ground that the Seventh Amendment was itself a sufficient guarantee. *Hearing on S-5307 Before the Senate Committee on Education and Labor*, 60th Cong., 1st Sess. 8-9, 44-46 (1930). This legislative intent is confirmed by those relatively frequent instances in which this Court has approved or declined review of the lower courts' exercise of their supervisory power over FELA jury verdicts. *Herdman* v. *Pennsylvania R.R.*, 352 U.S. 518 (1957); *Brady* v. *Southern R. Co.*, 320 U.S. 476 (1943); *Lozano* v. *Texas Mexican R. Co.*, 564 F.2d 720 (5th Cir. 1977), *cert. denied*, 435 U.S. 971 (1978).

II.

THERE IS NO SPECIAL OR IMPORTANT REASON FOR REVIEW BY THIS COURT SINCE THE LOWER COURTS APPLIED THE PROPER STANDARD OF REVIEW AND THE SOLE ISSUE IS THE SUFFICIENCY OF THE EVIDENCE

Stripped of the insubstantial constitutional argument, the Petition becomes an attack on the trial court's conclusion that Petitioner failed to present proof of Respondent's negligence. Such an argument in this Court ignores the history of the FELA, and the appreciation of the courts below for that history.

No observer of FELA litigation can escape the significant role this Court played during the middle decades of this century in the judicial review of FELA jury verdicts. From 1943 to 1959 the Court granted fifty-three (53) petitions for certiorari in FELA cases seeking such review. *See* Appendices to opinions of Douglas, J., in *Harris* v. *Pennsylvania R. Co.*, 361 U.S. 15, 20 (1959); *Wilkerson* v. *McCarthy*, 336 U.S. 53, 71 (1949). The resulting decisions created a storm of controversy between those who thought such cases had no place on the Court's crowded docket, Hart, *Foreward: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 Harv. L. Rev. 84 (1959), and those who viewed the decisions as the triumph of the rights of

injured railroad workers over a hostile judiciary. Arnold, *Professor Hart's Theology*, 73 Harv. L. Rev. 1298 (1960); DeParcq, *The Supreme Court and the Federal Employers' Liability Act, 1956-57 Term*, 36 Tex. L. Rev. 145 (1957).

These cases even led to an unusual degree of dissension among members of the Court. Justice Frankfurter felt so strongly that the Supreme Court should not review sufficiency of the evidence questions that he persistently took the unusual step of refusing to vote on the merits even after certiorari had been granted. *E.g. Affolder* v. *New York, C. & St. L. R. Co.*, 339 U.S. 96, 101 (1950) (Frankfurter, J., *dissenting*); *Carter* v. *Atlanta & St. A. R. Co.*, 338 U.S. 430, 437 (1949) (Frankfurter, J., *dissenting*). Other Justices argued that despite protestations to the contrary, the majority in these cases were dispensing with employer negligence as the basis for liability under the FELA. *See Harris* v. *Pennsylvania R. Co.*, 361 U.S. 15, 27 (1959) (Harlan, J., *dissenting*); *Wilkerson* v. *McCarthy*, 336 U.S. 53, 76 (1949) (Jackson, J., *dissenting*).

Two themes emerge from these cases. First, the history of judicial review of FELA cases, especially since the 1939 amendments, "has been one of gradual but persistent liberalization in the direction of allowing the plaintiff to recover whenever he is injured . . ." W. Prosser, *Handbook of the Law of Torts* at 536 (4th ed. 1971). One cannot read *Ringhiser* v. *Chesapeake & O. Ry. Co.*, 354 U.S. 901 (1957) without realizing that the FELA stretches the concept of negligence to its limits. The landmark case of *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 (1957) makes clear Congress was dissatisfied with the relationship between railroad and worker under common law rules of negligence and meant to change it with the FELA. *Id.* at 508-509. As the Petition notes, it was *Rogers* which enunciated the famous test for a jury case under the FELA which continues to be the standard today. Petition at 7; *Id.* at 506.

Of equal importance, however, is the principle that negligence remains the basis for liability under the FELA. Proof of an employer's negligence is still an essential element of a plaintiff's case. *Almendarez* v. *Atchison, T. & S. F. R. Co.*, 426 F.2d 1095, 1099 (5th Cir. 1970). "The Act does not make the employer an insurer," and directed verdicts for employers or judgments notwithstanding jury verdicts continue to be affirmed. *Inman* v. *Baltimore & O. R. Co.*, 361 U.S. 138, 140 (1959); *Lozano* v. *Texas Mexican R. Co.*, 564 F.2d 720 (5th Cir. 1977), *cert. denied*, 435 U.S. 971 (1978).

Had the trial court ignored these principles or been insensitive to a plaintiff's rights under the FELA, Petitioner might have cause to complain to this Court, and this Court might well exercise its jurisdiction to correct the mis-application of well settled federal law. This, however, is not the case. The trial court in this instance followed the prior holdings of this Court:

> This court is not at all unmindful of the great reluctance courts entertain with respect to limiting jury resolutions in FELA cases. Even minimal negligence on the part of the railroad employer will support a verdict in favor of the employee. Certainly if even minimal evidence supports a jury finding against the employer such a finding is invulnerable (App. A-6).

Since it is beyond dispute that the trial court appreciated and applied the proper standard of review, the sole remaining issue is whether the trial court reached the correct result.

Where the legal principles involved are well settled and properly applied by the courts below, there is no need or justification for this Court to weigh the evidence unique to a single case. In the days of real or perceived judicial hostility to the FELA it was appropriate for this Court "to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 509 (1957). But the desired result has

been achieved. Current FELA decisions hardly demonstrate an antipathy towards the rights of injured workers. Review in this case would, therefore, serve no important purpose within the meaning of Supreme Court Rule 17.1.

III.

THE JUDGMENTS OF THE LOWER COURTS WERE ENTIRELY CORRECT SINCE PETITIONER PRESENTED NO PROOF OF RESPONDENT'S NEGLIGENCE

Granting this Petition would be particularly inappropriate since the lower courts were entirely correct in concluding there was no evidence of Respondent's negligence.

The undisputed evidence at trial demonstrated there was no defect in Petitioner's workplace or in the tools he was furnished. Petitioner cannot blame a fellow servant or supervisor for his injury since he was working alone and at his own pace. Centuries of experience and each witness questioned on the subject tell us that a wheelbarrow is a reasonable and safe implement to haul debris. Petitioner was thus unable to point to any hazardous condition or errant conduct which contributed to his injury.

The only theory of negligence seriously advanced at trial or on appeal was based on a classic "better way to do things" argument. Realizing that hindsight will always suggest an alternative, Petitioner argued that Respondent was negligent in failing to provide him with a forklift or front end loader to haul away the debris, as was done on occasion on other shifts (App. A-6). In considering this theory, the threshold question of law is whether Respondent had a duty to provide Petitioner with this equipment when it was undisputed that the tools he did have were entirely reasonable and adequate to safely accomplish the task. A corollary inquiry is whether the use of alternative means on other occasions is probative evidence of negligence in this

instance in the absence of even the slightest indication that the method actually used was hazardous.

There are two competing principles at work in this inquiry. On the one hand, Respondent clearly had a duty to provide Petitioner with safe appliances. On the other hand, the law of negligence and the FELA have always recognized that the occurrence of an injury is not evidence of unreasonable conduct. This duty, therefore, must be circumscribed by the test of reasonableness and is not absolute. Provided those in use are safe and suitable, the employer is not required to provide the latest, best and most perfect appliance. *Chicago & N. W. R. Co.* v. *Bower*, 241 U.S. 470 (1916); *Atlantic Coast Line R. Co.* v. *Dixon*, 189 F.2d 525, 527 (5th Cir.), *cert. denied*, 342 U.S. 830 (1951).

If in the face of undisputed evidence of the reasonableness and safety of a particular tool a jury nonetheless has total discretion to declare the tool unreasonable, then the duty becomes one to supply absolutely safe tools under all circumstances. A plaintiff can dispense with evidence negligence and simply show the task could have been done some other way. Under this theory had Petitioner been injured using the forklift, he could have argued that its use was unreasonable solely because other men had a more reasonable implement — a wheelbarrow.

This Court has recognized that evidence of alternative means serves only to reinforce the unreasonableness of a method of work which, standing alone, has an identifiable risk of injury. In *Stone* v. *New York, C. & St. L. R. Co.*, 344 U.S. 407 (1953) the Court considered evidence of alternative methods of pulling ties only upon a showing that the plaintiff was encountering significant difficulties in accomplishing the task using the method dictated by his supervisor. Without a limitation on the probative value of alternative means inevitably suggested by hindsight, the employer would always be liable no matter how innocuous the chosen method might be.

In delineating the limits of Respondent's duty to provide safe appliances, the lower courts were deciding a question of law and not meddling in the fact finding process reserved to a jury. Neither the trial court nor the Court of Appeals were necessarily denying that there might be easier ways to haul debris than the method used here. Their holdings simply recognized that there being nothing unreasonable in the use of a wheelbarrow in this instance, there was no duty to provide the easiest means.

CONCLUSION

This Court's repeated protestations that negligence remains the basis of liability under the FELA must be taken at face value by litigants and the lower courts. In doing so, the trial court and Court of Appeals attempted to apply a rational concept of negligence in concluding that Petitioner produced no proof that Respondent failed to furnish him a reasonably safe appliance. Evidence that others used mechanical equipment may suffice to prove that easier and faster methods were employed. But such evidence has no bearing on the unanimous conclusion of the witnesses and common sense; that a defect-free wheelbarrow is a reasonable tool with which to haul debris.

Since Petitioner's case fails not only on the merits, but also as a matter worthy of consideration by this Court, the Petition should be denied.

FERD. C. MEYER, JR.
FERD. C. MEYER, JR.
Counsel of Record
HOWARD P. NEWTON
Matthews & Nowlin
1500 Alamo National Building
San Antonio, Texas 78205
(512) 226-4211

Attorneys for Respondent,
Southern Pacific Transportation Company

APPENDIX A

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION

JOE F. SOTO,

Plaintiff,

Civil Action No.
SA-77-CA-171

V.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Defendant.

BOOTLE,* Senior District Judge:

Ready for decision now is the defendant's motion for judgment in its favor notwithstanding the jury verdict for plaintiff. At trial the court overruled the defendant's timely motions for directed verdict though then entertaining serious doubts as to whether the evidence warranted jury submission. That conservative course was adopted so that the jury could pass upon the case in the first instance thereby avoiding the necessity, come what may, of reinstating the case upon an overcrowded trial docket.

When the instant motion came in, the court, though still recalling the evidence right vividly, out of an abundance of caution, and so that the motion could receive the careful consideration to which it is clearly entitled, ordered a transcript of the record as it relates to negligence and causation. A study of that transcript confirms the doubts which the court entertained at trial. A brief summarization of the facts will disclose the necessity for granting the instant motion.

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* Sitting by designation.

In 1974, plaintiff, then 35 years of age, went to work for defendant as a laborer. Then for a short while he became a machinist apprentice, was relieved of employment through a reduction-in-force layoff, and then rehired as a laborer.

On April 29, 1976 he reported for work on the 11:00 P.M. to 7:00 A.M. shift. He began work cleaning out the number 6 diesel pit. He says his gang leader said, "Well, let's start cleaning those pits." The gang leader says he did not tell him to clean the pit but that the plaintiff started to clean the pit because "we been told by the foreman to clean up around there."

There are two diesel pits, number 6 and number 7. They are cement-lined excavations underneath the railroad tracks, as wide as the tracks, five or five and one half feet deep, and as long as two diesel engines. The purpose of the pits is to permit workmen to stand upright and perform maintenance work on the lower parts of the diesel engines. The pits become cluttered with sand dropping from the engines and tracks, with oil dropping from the engines, with rain water until it runs out through a drain at the bottom of the pit and with other debris including cans and trash that sometimes finds its settling place there. There are three methods for removing all this matter from the pits. The area adjacent to these pits on all sides is paved. In all three methods the workman descends into the pit by a ladder at one end and with a shovel throws the debris up and out to the paved area adjacent to the pit. In one method he throws it directly into a wheelbarrow situated adjacent to the side of the pit. When the wheelbarrow is loaded to a proper extent and amount (determined by the workman) he ascends the ladder, rolls the wheelbarrow and content a distance of approximately fifty to seventy-five feet, dumps it into a pile, then returns and repeats the process. Another method is to shovel the debris into a container constituting a part of a front-end loader commonly called a "bobcat." The third method is to shovel the debris directly into a metal box attached to a forklift.

The evidence is vague and uncertain as to what, if any, considerations determine which of the three methods is used.

Charles L. Casey, a mechanical foreman with the defendant, with six years experience, testified that there was no reason why he would use a wheelbarrow on one occasion and a forklift or a bobcat on another. (Transcript p. 205)

Benjamin Franklin Phrampus, a diesel mechanical foreman, when asked, "What about using the bobcat or forklift at night," testified that on the 3:00 to 11:00 shift he seldom used the bobcat or forklift; that one reason was that there wasn't a key available and most of the time the bobcat and the forklift were broken down; "only use it when I needed to use — move heavy materials, tractor's motors and wheels," and that on his shift if the bobcat or forklift had been available to him he would have used them if he needed them but "I can't elaborate any why I would use it or what would make me need it." (p. 259).

James Earl Hill, a gang leader, testified, "there is really no set way to do it." (p. 267)

Whereas, Mr. Casey, the mechanical foreman, said "the most common used method is a forklift" (p. 213), Mr. Raymond Valenzuela, Jr., an apprentice machinist, formerly a laborer, testified that he had used a forklift "one or two times . . . when the bobcat was broken down." (p. 219)

Apparently, only the wheelbarrow was used on the night shift. Plaintiff's gang leader, Mr. Jasso, did not know how to operate the bobcat. (p. 284) Plaintiff had never operated either piece of equipment and had never been trained to do so. (pp. 118, 165) Mr. Casey, the mechanical foreman, testified that a man would have to receive some instructions before operating the bobcat — about a half hour — and "a few minutes" instruction before using the forklift. (p. 208)

James Earl Hill, the gang leader, says he never really makes the decision based upon how much sand is in there, "but you

could. If you got a lot of sand . . . you are going to need a forklift and sand box. . . If you got a little bit of sand, you use the front end loader . . . . When it's practically nothing in there [two or three wheelbarrows full] you would use the wheelbarrow." (p. 267) Similarly, Mr. Jasso, plaintiff's gang leader, testified, "Well, we got a little bit of sand or whatever gets in the pits, we use a wheelbarrow all the time . . . . When we get . . . a whole lot of sand, we get a forklift and a hopper or that bobcat." (p. 282)

On the night in question the plaintiff loaded the wheelbarrow once and rolled it away some fifty or seventy-five feet, emptied it and rolled the empty wheelbarrow back to the pit. There was no mishap on that first trip. Plaintiff estimates that the first load weighed 200 to 300 pounds. Then he reloaded the wheelbarrow, pushed it the same distance and when he was unloading or "dumping" the wheelbarrow he heard something "pop" and felt something in his back. He felt no pain then because his "body was still hot." (p.112) The pain came later. He was "going to go back in the hole" but was called away to another assignment. (p. 113) Apparently there was not much debris in the pit that night. When asked about that, the plaintiff said, "plenty to fill up two of those [wheelbarrow loads]." (p. 151) We have plaintiff's testimony that he was "about to go back in the hole," but was sent to another job and the gang leader's testimony that he "guesses" the plaintiff got the pit pretty well cleaned out, though he did not check it.

Of controlling significance are the following facts:

There was nothing wrong with the wheelbarrow that night. The plaintiff so testified. (p. 148) In fact, it had a rubber tire and the defendant had been using rubber-tired wheelbarrows for ten years; (p. 270)

There was nothing wrong with the shovel that night. The plaintiff so testified; (p. 148)

Moreover, there was nothing wrong "with the area there where [plaintiff] was working along within the pit or on the walkway." The plaintiff so testified. (p. 148) This means that there was no obstruction or impediment to the free rolling of the rubber-tired wheelbarrow; and

There was no one rushing the plaintiff to do the job in a hurry (p. 150) and there was no reason why the plaintiff could not have put less sand in the second load. (p. 151) The plaintiff so testified.

This court is not at all unmindful of the great reluctance courts entertain with respect to limiting jury resolutions in FELA cases. Even minimal negligence on the part of the railroad employer will support a verdict in favor of the employee. Certainly if even minimal evidence supports a jury finding against the employer such a finding is invulnerable. But just as certainly, if a verdict finds no support in the evidence, it should be set aside. This rule was succinctly stated in *Rodriguez* v. *Delray Connecting R.R.*, 473 F.2d 819 (6th Cir. 1973) as follows:

> The Federal Employer's Liability Act consistently has been construed liberally by the courts to allow employees, injured in the course of their employment, to recover even where the negligence of the employer has been minimal.[2] However, the employee must still demonstrate some negligence and proximate cause. *Herdman* v. *Pennsylvania RR*

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[2] See for example, *Gallick* v. *Baltimore & Ohio RR Co.*, 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963). (Railroad held liable where an employee was bitten by an insect. Negligence was found in permitting a stagnant pool of water to exist that attracted vermin and insects.); *Webb* v. *Illinois Central RR Co.*, 352 U.S. 512, 77 S.Ct. 451, 1 L.Ed.2d 503, *rehearing denied*, 353 U.S. 943, 77 S.Ct. 809, 1 L.Ed.2d 764 (1957) (Railroad found liable where an employee slipped on a cinder embedded in a roadbed.); *Tennant* v. *Peoria & Perkin Union RR Co.*, 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520, *rehearing denied*, 321 U.S. 802, 64 S.Ct. 610, 88 L.Ed. 1089 (1944) (Railroad found liable where one of its engineers failed to ring a bell before starting the locomotive.)

Co., 352 U.S. 518, 520, 77 S.Ct. 455, 1 L.Ed.2d 508 (1957); *Tiller* v. *Atlantic Coast Line RR Co.*, 318 U.S. 54, 67, 63 S.Ct. 444, 87 L.Ed. 610 (1943).

The rule must still be that in order to recover the plaintiff must "demonstrate some negligence and proximate cause."

The plaintiff alleged negligence on four grounds, which are:

(a) Defendant failed to furnish the plaintiff with a reasonably safe place to work;

(b) Defendant failed to furnish the plaintiff with reasonably safe equipment with which to perform his work;

(c) Defendant failed to warn the plaintiff of the hazardous method by which he was being required to accomplish his assigned task; and

(d) Defendant required the plaintiff to perform tasks of heavy manual labor for which he was physically unfit and which the defendant knew or should have known would be injurious to the plaintiff's physical condition.

With respect to ground (a), there could hardly be a safer place to work than the paved area over which plaintiff was rolling the wheelbarrow.

With respect to ground (b), the plaintiff's own testimony, not contradicted by any other evidence in the case, demonstrates that both the wheelbarrow and the shovel, as well as the area where plaintiff was working, along with the pit and the walk way, were safe. If this verdict stands its purported message to railroads would be that they can no longer use wheelbarrows, even when equipped with rubber tires, and that the use of such wheelbarrows is "unreasonable." That message would be much more startling and more drastic than the message sent by *Rodriguez, supra,* to the effect that the appearance on the modern scene of the hydraulic spike remover rendered "unreasonable" the old maul and crowbar method of removing

spikes. There is much difference between a rubber-tired wheelbarrow moderately loaded and being pushed over a smooth level surface and swinging a maul striking steel against steel.

We perceive the law still to be that even in FELA cases an employer is neither required to furnish the employee with the latest, best or most perfect appliance with which to work, nor to discard standard appliances already in use that are reasonably safe and suitable, even though later improvements have been discovered. *Chicago & Northwestern Rwy. Co.* v. *Bower*, 241 U.S. 470, 36 S.Ct. 624, 60 L.Ed. 1107 (1916); *Baltimore & Ohio Rwy. Co.* v. *Groeger*, 266 U.S. 521, 45 S.Ct. 169, 69 L.Ed. 419 (1925); *Atlantic Coastline* v. *Dixon*, 189 F.2d 525 (5th Cir. 1951). *See also Palmer* v. *Wichita Falls Northwestern Rwy. Co.*, 159 P. 1115 (Okl., 1919) and *Lowden* v. *Bowen*, 183 P.2d 980 (1947).

Since the railroad employer is charged with the duty of providing the employee with reasonably safe equipment in order to meet that responsibility, the employer must be accorded the privilege of selecting the equipment. It is not difficult to imagine what could have happened if defendant had ordered the plaintiff to use this mechanical equipment with which he was not familiar and as to which he had received no training. If he had used such equipment and if it caused him injury, the plaintiff, with some logic, could have urged that the defendant was negligent in not providing him with the more easily operated and much safer wheelbarrow.

As to ground (c), we fail to see that under the evidence in this case plaintiff was being required to accomplish his task in any hazardous manner or that any warning was required or appropriate.

As to ground (d), the evidence contains no suggestion that defendant had any knowledge that plaintiff was physically unfit to do the work ordinarily required of a laborer at a railroad, for which work plaintiff applied and was accepted. On the contrary,

the record shows that plaintiff had no physical problems when he was employed by defendant (p. 100), that he was employed as a laborer (p. 100), and that "before he went to work for the railroad company he [had] always engaged in jobs that required heavy lifting, manual labor." Plaintiff's counsel, in his opening statement to the jury, stated that plaintiff had previously served as a truck driver "which involved delivering beverages where they would lift kegs of beer and cases of beer and soda pop and deliver them. . . ." (p. 76)

Notwithstanding the great latitude which the law allows to juries in finding "minimal" neglect against a railroad employer under the Federal Employers Liability Act and with no criticism of that latitude, this court is impelled to the conclusion that, under the facts of this case, not even minimal negligence has been established.

Counsel for the defendant may prepare and submit an appropriate order granting the pending motion, after affording counsel for plaintiff an opportunity for suggestions as to form.

SO ORDERED, this 5th day of November, 1979.

/s/ W. A. BOOTLE
W. A. Bootle
Senior U.S. District Judge